IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 457 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ATUL ALIAS LALO SARATANBHAI DESAI & 1 - Applicant(s)

Versus

STATE OF GUJARAT - Respondent(s)

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Appearance :

MR UA TRIVEDI for Applicant(s) : 1 - 2.
MR HM PRACHCHHAK, APP for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 05/10/2005

ORAL JUDGMENT

1. By filing instant petition under Section 397 read with Section 401 of the Code of Criminal Procedure ('the Code' for short), the petitioners – original

accused No.1 and 3 seek to challenge the order dated 24.6.2004 recorded below application Exhs.3, 7 & 8 in Sessions Case No.162 of 2004 by the learned Additional Sessions Judge, Court No.8, City Sessions Court, Ahmedabad, by which application filed by the petitioners at Exh.7 came to be rejected.

2. The petitioners are original accused No.1 and 3 in a supplementary chargesheet submitted by Amraiwadi Police Station, Ahmedabad, for the offence registered C.R.No. I-151 of 2000 for commission of alleged vide offences under Sections 120-B, 303, 34, 212 and 201 of the Indian Penal Code as well as under Section 135 of the Bombay Police Act.

2.1 According to the case of prosecution, one Amthabhai Sankabhai Desai was murdered on 27.3.2000, and in connection with the said offence, one Gova @ Nagji Rabari along with seven other accused persons have been prosecuted. In the said chargesheet, present petitioner along with two other persons were shown as absconding in the first chargesheet which is filed against Govaji Nagji Rabari and seven other accused. Subsequently, the petitioners came to know that they

have also been implicated in the said offence, therefore the petitioner No.2 approached the Sessions Court, Ahmedabad, for obtaining anticipatory bail as, according to him, he has falsely roped into the offence by the police. While deciding the said application filed by the petitioner No.2 seeking anticipatory bail, the learned Additional Sessions Judge came to the conclusion that the only offence charged against the petitioner No.2 was under Section 212 of the Indian Penal Code ('IPC' for short), and, as the said offence is a bailable offence, application for anticipatory bail was not maintainable. The petitioner No.2 therefore appeared before the learned Magistrate having jurisdiction over the Police Station and obtained an order of regular bail. The petitioner was arrested on 24.7.2000 i.e., after three days from the date of filing first chargesheet for the offence. Subsequently, the petitioner No.1 was also released on bail.

2.2 The first chargesheeted accused was committed to the Court of Sessions, Ahmedabad, and it was numbered as Sessions Case No.72/2002, whereas, the case against the present petitioners and two other accused was never committed to the Court of Sessions. According to the

petitioners, Sessions Case No.72/2002 was opened by the prosecution and almost all witnesses have been examined in the trial. During the course of trial, it was revealed that a supplementary chargesheet against four other accused including present petitioners have been filed for the same offence. At the fag end of trial in Sessions Case No.72/2002, supplementary chargesheet against the present petitioners and two other accused have been filed in the Court of Metropolitan Magistrate who committed the case to the Court of Sessions where the said case has been numbered as Sessions Case No.162/2004.

2.3 The petitioners appeared in the Court of learned City Sessions Judge, Ahmedabad, pursuant to the committal order on 23.6.2004, and moved an application at Exh.7 praying to discharge them under Section 227 of the Code. The said application Exh.7 was heard by learned Additional Sessions Judge, City Sessions Court, Ahmedabad, on the very same day. The accused No.2 and 4 also tendered applications seeking discharge them from prosecution vide Exh.3 and 8. The learned Additional Sessions Judge, vide a common order dated 24.6.2004 passed below applications Exh.3,

7 & 8 was pleased to discharge the accused No.2 to 4 and rejected the applications of the petitioners seeking discharge, which has given rise to the present petition.

3. Mr.U.A.Trivedi, learned advocate for the petitioners contended that the petitioners have moved application Exh.7 praying to discharge them from all the charges of the prosecution levelled against them. Alternatively, the petitioners had also prayed that, if at all the petitioners can be alleged to have been committed any offence though they have not admitted, it would be under Section 212 of IPC, which is triable by the learned Magistrate's Court, therefore, it was also prayed to send the case for trial against them to the learned Magistrate's Court to try the offence under Section 212 of the IPC.

4. During the course of submissions, Mr.Trivedi, learned advocate for the petitioners does not press this petition seeking discharge from the prosecution. However, he prays that the chargesheet filed in the Metropolitan Magistrate Court which is committed to the Court of learned City Sessions Judge, Ahmedabad, may be

sent back to the Metropolitan Magistrate's Court, Ahmedabad, for deciding the trial against the petitioners as offence under Section 212 of IPC is triable by the Court of learned Judicial Magistrate (First Class), as against the petitioners only charge under section 212 of the Indian Penal Code have been framed.

5. In support of the aforesaid contention, he has relied upon following three decisions:

(i) Ram Raj Chaudhury Vs. Emperor reported in AIR 1946 Patna 74.

(ii) Kuriakose Chacko Vs. State reported in AIR (38) 1951 Travancore-Cochin 90.

(iii) Aleem Vs. State of A.P. Reported in 1995 Cri. L.J. p.866.

5.1 He, therefore, urge to pass an appropriate order directing the learned Additional Sessions Judge, City Sessions Court, Ahmedabad, to transfer the Sessions Case No.162 of 2004 to the learned Metropolitan Magistrate's Court, Ahmedabad, who is having a

territorial jurisdiction to decide the case as per the charge framed against the petitioners and in accordance with law.

6. Mr.Prachchhak, learned APP for the respondent-State of Gujarat has contended that, since the petitioners are not pressing this petition seeking discharge from the prosecution and prayed only to transfer the case to the learned Magistrate's Court, in view of the fact that offence under Section 212 of IPC is triable by the learned Magistrate's Court, an appropriate order may be passed in this regard.

7. This Court has considered the submissions made by Mr.U.A.Trivedi, learned advocate of the petitioners and Mr.Prachchhak, learned APP of the respondent-State of Gujarat, perused the impugned order as well as the statutory provisions contained under the Code and the decisions cited at the Bar.

8. There is no dispute to the fact that the petitioners are the original accused in the supplementary chargesheet submitted by the Amraiwadi Police Station, Ahmedabad, for the alleged offence registered against

the petitioners being C.R.No.I – 151 of 2000. Though the petitioners were shown as accused under Sections 120-B, 302, 34, 212 and 201 of the IPC as well as under Section 135 of the Bombay Police Act, and the chargesheet is also filed for commission of the said offence, the learned City Sessions Judge has framed the charge against the petitioners for commission of offence under Sec.212 read with Sec.34 of IPC only, and according to this Court, the learned Additional City Sessions Judge, Ahmedabad, has rightly framed the charge under Sec.212 and sec.34 of the IPC.

9. So far as the offence under Section 212 of IPC is concerned, it is penal provisions against the person who harbour the principal offenders. Therefore, the trial for commission of offence under Section 212 of IPC is concerned, it must be tried separately from the principal offenders, and unless the principal offenders is found to be guilty, trial for commission of offence under Sec.212 of IPC can not be proceeded.

10. In the case of Ram Raj Chaudhury (supra), the Patna High Court has held as under:

> “There is another aspect of the case which has been lost sight of by the Courts below. The prosecution was premature. Section 212 says nothing about the harbouring of an absconder or an accused person. It renders punishable only the harbouring of a person when it is known or there is reason to believe that he is the offender. The first thing to be proved in a case under this section is that an offence has been committed by the person harboured. Jang Bahadur's trial, however, has not yet been concluded. Until actually convicted, he is, like every one else, entitled to the presumption that he is innocent. Only the Court can say in due course whether he is actually an offender or not. The Court has not yet said that; and until the Court has pronounced upon the fact, a prosecution for harbouring him is clearly premature.”

10.1 In the case of Kirakose Chacko (supra), the High Court of Travancore-Cochin has held as under:

> “In Parichan Singh Vs. Emperor, 1944 P.No.521 Meredith J. of the Patna High Court took the view

that until the 'offender' has been convicted of the offence he is alleged to have committed no prosecution can be launched under s.212, Penal Code for harbouring him. That learned Judge expressed the same view in an unreported case cited with approval by a Division Bench of the Patna High Court consisting of Fazl Ali C.J., and Ray J. in Ram Raj Vs. Emperor, AIR (33) 1946 Pat.74: (47 Cri.L.J. 573. Fazl Ali C.J., who pronounced the judgment of the Bench said as follows with reference to that unreported case:

“The point which arises in this case arose in another case in this Court, which related to the conviction of one Jang Bahadur, and Meredith J. dealt with it in – is way: There is another aspect of the case which has been lost sight of by the Court below. The prosecution was premature. Section 212 says nothing about the harbouring of an absconder or an accused person. It renders punishable only the harbouring of a person when it is known or there is reason to believe that he is the offender. The first thing to be proved in a case under this section is that an offence has

been committed by the person harboured. Jang Bahadur's trial, however, has not yet been concluded. Until actually convicted, he is, like every one else, entitled to the presumption that he is innocent. Only the Court can say in due course whether he is actually an offender or not. The Court has not yet said that; and until the Court has pronounced upon the fact, a prosecution for harbouring him is clearly premature. The proper course would have been to hold up this case under S.212, until the conclusion of Jang Bahadur's trial, when it might have proceeded in the event of his conviction, but obviously not otherwise.

The conviction and sentence in the Division Bench case were accordingly set aside."

10.2 In the case of Aleem (supra), the Andhra Pradesh High Court has held as under:

"The accused charged for harbouring the offenders and also for an offence for dishonestly receiving stolen property from other accused who were charged for offences of robbery and murder, could

be tried along with other accused as the offence alleged to be charged against accused formed part of same transaction. Further, if the charge against accused was under S.212, IPC simpliciter, without any other charges, then the accused could not be tried for the offence under S.212 IPC. However, the accused was charged with another offence viz., under S.411, IPC also in addition to the offence under S.212, IPC and, therefore, to avoid multiplicity of trial and also as the offences alleged against accused are committed in course of same transaction, the charge for the offence under S.212, IPC against the accused must also be tried and decided in same case without postponing the same for consideration by a separate case."

11. Applying the principle laid down by the three different High Courts in above referred to judgments to the facts of the present case, it cannot be said that the offence alleged to have been committed by the petitioners can be said to be forming part of the same transaction of which has been committed by the principal offenders and who have been convicted as reported by

Mr.H.M.Prachchhak, learned APP. Therefore the offence under Sec.212 of IPC must be tried separately from the principal offenders, and unless the charges against the principal offenders are proved, then and then the trial against the accused who harbour principal offenders can be commenced. Admittedly, in the instant case, the learned Additional City Sessions Judge, Ahmedabad, has framed the charge against the petitioners under Sec.212 read with Sec.34 of the IPC which is punishable for five years if they harbour the offender if the offence be capital offence, and three years if they harbour offenders of the offence punishable of life or imprisonment, and as per First Schedule (classification of offences trial for commission of offence under Sec.212 is to be tried by the Magistrate of First Class.

11. Therefore, in aforesaid view of the matter, the impugned order deserves to be quashed and set aside qua not sending the trial to the J.M.F.C. Court.

12. For the foregoing reasons, the petition succeeds in part and accordingly it is partly allowed. The impugned order dated 24th June, 2004, passed by the learned Additional Sessions Judge, Court No.8, City Sessions

Court, Ahmedabad, in Sessions Case No.162 of 2004 – below Exh. 7 is partly quashed and set aside qua not accepting the prayer to send the trial of Sessions Case No.162 of 2004 to the learned J.M.F.C. Court for deciding the trial, the result of which is the learned Additional City Sessions Judge, City Sessions Court, Ahmedabad, is directed to send the trial of Sessions Case No.162 of 2004 to the Court of learned Metropolitan Magistrate's Court, Ahmedabad, for deciding the same in accordance with law.

Rule is made absolute to the aforesaid extent. Direct service is permitted.

(A.M. Kapadia, J.)

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